The Honourable John Douglas, *an Infant, by his Guardians,* - - - - - - - - - } Appellant.

The Earl of Morton, - - - - - - Respondent.

The Appellant's CASE.

JAMES, late Earl of *Morton*, the Appellant and Respondent's Father, had by his first Wife, *Agatha Halliburton*, (with whom he got no Fortune) several Children; of whom the Respondent and Lady *Mary Douglas* are the only Survivors.

1733. In 1755, the said Earl married his second Wife, *Bridget Heathcote*, the late Sir *John Heathcote*'s Daughter, and by Settlement previous to the Marriage "between the Earl of *Morton* of the one Part, and *Bridget Heathcote*, with Consent of her "Father Sir *John Heathcote*, on the other Part," in Consideration of the then intended Marriage, and of 12,000 *l.* paid as the said *Bridget*'s Fortune, the Earl became bound to secure to *Bridget*, in case she should survive him, a clear free Annuity of 1000 *l.* out of his Estates in *Scotland*, and to secure to the Children of the Marriage the Sum of 26,000 *l.* to be divided, in case of one Son and one Daughter (the Event which happened) by 14,000 *l.* payable to the Son, at the first Term of *Whitsunday* or *Martinmas* after the Earl's Death, and the Son's attaining the Age of Twenty-one, and 12,000 *l.* to the Daughter at the first Term of *Whitsunday* or *Martinmas* after the Earl's Death, and her attaining the Age of Twenty-one, or Day of Marriage, with legal Interest for each Child's Portion from their respective Terms of Payment: Then comes a Proviso, that notwithstanding these Terms of Payment, in case *Bridget* should survive the Earl, 14,000 *l.* only of the 26,000 *l.* should be payable or bear Interest during her Life, and the Residue at the first Term after her Death; and, lastly, a Declaration, "That whatever Payments might happen to be made by the Earl to the Child or Children of the Marriage, "of their respective Portions above-mentioned, before the several Terms of Payment thereof, should be imputed *pro tanto* in "Satisfaction of the same." The Trustees in this Settlement were soon after infeofed in the Earl's whole Estates in *Scotland*, for securing the Jointure and Children's Portions.

By Indenture Tripartite of the same Date with this Marriage Settlement, made between the Earl of the first Part, *Bridget Heathcote* of the second, and Sir *John Heathcote* and *Daniel Wray* of the third Part, after reciting the intended Marriage between the Earl and *Bridget Heathcote*, and that at a Treaty thereon, it was agreed, that Part of *Bridget*'s Marriage Portion, not exceeding 6000 *l.* should be laid out in the Purchase of a Messuage or Dwelling-house, within or near the City of *Westminster*; and that the same should be settled in Trust, to and for the Use of the Earl for Life; then to *Bridget* for Life; and in case that at the Death of the Survivor of the Earl and *Bridget*, there should be an eldest or only Son of the Marriage surviving, and also one or more other Child or Children, then to the Use of such eldest or only Son, and other the Child or Children, in such Parts, Shares and Proportions as the Earl, by any Deed or Writing, or by his Will, should direct or appoint.

The Earl was seised and possessed of very considerable real and personal Estates, all in his own Power, without Entail or Restriction; and also had, by Descent from his Father, a Wadset or Mortgage over the Earldom of *Orkney*, redeemable by the Crown on Payment of 30,000 *l.* which by Act of Parliament in 1742 was vested irredeemably in the Earl and his Heirs, discharged from any Power or Right of Redemption in the Crown.

June 1766. In 1766, the Earl sold his *Orkney* Estate to Sir *Laurence Dundas* for 63,000 *l.* whereto the Respondent, though unnecessarily, but at the Purchaser's Desire, was a Party; and, at the same Time, the Earl spontaneously, and of his own free Will, signified his Intention of settling 30,000 *l.* Part of the Purchase-Money, on the Respondent, and the Representatives of the Family of *Morton*; and he executed a Deed for that Purpose in *July* that same Year.

2d August 1766. Of this Date, the Earl made and published his Last Will, reciting his Marriage Settlement; whereby it was covenanted, That 26,000 *l.* should be raised for Portions for the Children of that Marriage; and that 6,000 *l.* Part of the Countess's Fortune, or so much thereof as should be requisite, should be laid out in the Purchase of a House, in Trust for the Earl and Countess, and the Survivor of them, for Life, and for the Children of the Marriage, in such Proportions as the Earl should direct and appoint; and further reciting, That the Testator had purchased a House situated in *Brook-street*, in the Parish of *St. George, Hanover-Square*, with Part of the 6000 *l.*; that he had at present only a Son and a Daughter by the Countess; and therefore he directed, that the said 26,000 *l.* should be divided among his Children in the following Manner, *viz.* 12,000 *l.* to Lady *Bridget Douglas*, his Daughter, and 14,000 *l.* to *John Douglas*, his Son; and that, after the Countess's Death, the House in *Brook-street* should be divided between his said Son and Daughter, so as that Lady *Bridget* should have one-tenth Part, and *John Douglas* the remaining nine-tenth Parts thereof. He bequeathed to the Countess 500 *l.* for Mourning, his Carriages and Coach-Horses, and gave her, while she remained unmarried, the Use of all his Silver Plate that should be in his Houses in *Brook-street* and *Chiswick*; and after her Death or second Marriage, gave the said Plate to his eldest Son, the Respondent; and further gave the Countess, while she remained unmarried, the Use of all his Household Goods, Furniture, *&c.* in his House in *Brook-street*, and from and after her Death, or second Marriage, to his Son *John Douglas*; and in case of his Death before the Age of Twenty-one without Issue, he gave the same to the Respondent, and to his (the Testator's) Daughters, Lady *Mary* and Lady *Bridget Douglas*, equally. He then gave all his Books, Mathematical Instruments, Medals, Gems, and Impressions from Gems (all which were well chosen, and of considerable Value) to the Respondent, his eldest Son; and devised to his Son *John*, the Appellant, his Mansion-House at *Chiswick*, with the Appurtenances and Household Goods therein; declaring, that the Countess should have the Liberty of living therein, and using the Furniture during her Life or Widowhood; but if she died or married before his Son *John* attained Twenty-one, then he devised the said House and Appurtenances to Sir *Gilbert Heathcote* and *John Heathcote*, upon Trust that they, or the Survivor, might, if they or he thought proper, sell the same, with the Furniture; and if they did, he gave the Money arising from such Sale to his said Son *John*, for his own proper Use and Benefit; but if his said Son died before attaining Twenty-one without Issue, *&c.* he gave such Money to his Son the Respondent, and Lady *Mary* and Lady *Bridget Douglas*, equally to be divided among them; but if the House, *&c.* should not be sold, and his Son *John* died before Twenty-one without Issue, he then gave it to his Daughter Lady *Bridget*; and if she died before Twenty-one without Issue, he gave it to his Son Lord *Aberdour*, the Respondent, and his Heirs for ever.—He gave to his Son *John* all his Capital in the Royal Bank of *Scotland*, and to his Daughter Lady *Mary Douglas* 100 Actions in the *French East-India* Company; and then declared as follows: "It is my Will and Meaning, that my personal Estate in *England* which I shall be possessed of at the "Time of my Death, and not otherwise disposed of by this my Will (except such Sum of Money as hath been or may be "appropriated or directed by me to be laid out in the Purchase of Lands and Hereditaments in *Scotland*, for the Benefit of "the said Lord *Aberdour*, and failing him his Issue, or any other Person succeeding to the Title of Earl of *Morton*, or such "Part thereof as shall not in my Lifetime have been laid out in such Purchase) shall be applied towards paying the said "Sum of 12,000 *l.* Part of the said Sum of 26,000 *l.* herein before appointed for my said Daughter Lady *Bridget Douglas*, "I give and bequeath all the Rest and Residue of my Goods, Chattels, personal Estate and Effects in that Part of *Great* "*Britain* called *England*, and in the Kingdom of *France*, not by me herein before otherwise disposed of (except such Sum "of Money as hath been or may be appropriated or directed by me to be laid out in the Purchase of Lands in *Scotland*, as "aforesaid, or such Part thereof as shall not in my Lifetime have been laid out in such Purchase) to my said Son *John*

"*Douglas*,

Douglas, for his own Use and Benefit: But if he should die before he attain the Age of Twenty-one Years, without leaving any Issue of his Body lawfully begotten living at the Time of his Death, or born in due Time after, then, and in such "Case, I give and bequeath the said Residue to my said Son Lord *Aberdour*, and my said Daughters Lady *Mary* and Lady "*Bridget Douglas*, equally to be divided among them, Share and Share alike. And it is my Will and Meaning, that the "said Rest and Residue of my said Goods, Chattels, personal Estate in *England* and *France*, so by me given to my said "Son *John Douglas*, and the said House and real Estate at *Chiswick*, valuing the same at the Sum of 6000 *l.* in case the "same should not be sold, and the said Household Goods and Furniture in and about my said House at *Chiswick*, valuing "the same at the Sum of 800 *l.* in case the same shall not be sold, or the Money to arise by the Sale of my said House and "real Estate at *Chiswick*, and of the Household Goods and Furniture in and about the said last-mentioned House, in case "the same shall be sold, shall, if the same shall be equal to, or more than the said Sum of 14,000 *l.* (Part of the said Sum "of 26,000 *l.*) appointed to or for him the said *John Douglas*, be in full Satisfaction of the said Sum of 14,000 *l.* I give "and bequeath all the Rest and Residue of my Goods, Chattels, personal Estate and Effects in *Scotland*, not by me other-"wise disposed of (except as herein before excepted) to my said eldest Son Lord *Aberdour*."

16th Oct. 1767. Of this Date, the Earl executed another Deed for settling the 30,000 *l.* Part of the Purchase-Money of the *Orkney* Estate, upon the Respondent, with the following Recital: "Whereas the Earldom of *Orkney*, and Lordship of *Zetland*, were "granted by her Majesty Queen *Anne* to the deceased *James* Earl of *Morton*, my Uncle, as a Mark of Royal Justice and "Favour to him, and for preserving his Family, redeemable by Payment of 30,000 *l.* Sterling: And whereas the said "Earldom and Lordship were, by Act of Parliament in the 15th Year of his late Majesty, vested in the Person of *me*, and "my Heirs and Assigns, irredeemably: And whereas I have sold the said Earldom and Lordship to Sir *Laurence Dundas*, "Baronet, conform to a Disposition thereof by me, with Consent of *Sholto Charles*, Lord *Aberdour*, dated the 19th and 23d "Days of *July* 1766: And now seeing that I am resolved to provide, settle, and secure the Sum of 30,000 *l.* Part of the "Price of the said Estate, to be enjoyed and laid out in the Purchase of Lands in *Scotland*:" Therefore the said Earl bound himself, his Heirs, Executors, and Successors, to pay to *Alexander Tait*, one of the principal Clerks in the Court of Session in *Scotland*, and *Alexander Farquharson*, Accountant in *Edinburgh*, or the Survivor of them, the Sum of 30,000 *l.* at the first Term of *Whitsunday* or *Martinmas* after his Death, in Trust to be laid out in the Purchase of Lands, to be conveyed and settled in favour of the Respondent, and the Heirs Male of his Body, *&c.* Proviso, "as it is hereby provided and "declared, That in case I shall at any Time hereafter purchase Lands in *Scotland*, and shall take the Rights in favour of "the said *Sholto Charles*, Lord *Aberdour*, and the Heirs Male of his Body, in Fee; that in that Case the Sums paid and "laid out by me for the Price of such Lands, as the same shall be specified in the Rights and Dispositions thereof, shall be "held and understood to be in Payment *pro tanto* of the aforesaid Sum of 30,000 *l.* and shall be deducted therefrom "accordingly."

Of the same Date, the Earl executed a Deed of Entail of the Lordship of *Aberdour*, and his other Estates in *Scotland*, whereby he limited them, after his own Death, to the Respondent, and the Heirs Male of his Body; Remainder to the other Heirs therein mentioned.

At this Time, as well as at that of executing his Will in the preceding Month of *August*, by far the greatest Part of the Earl's personal Estate was in *England*; but in *June*, 1768, he purchased two separate Parcels of Land in *Scotland* for 1417 *l.* 10 *s.* which, pursuant to the Proviso in the Deed of *October*, 1767, must *pro tanto* make Part of the Sum of 30,000 *l.*

In *July*, 1768, the Earl, in order to increase his Income by an higher Rate of Interest, was advised to lay out Part of his Money, then in *England*, (and which, by his Will, stood bequeathed to the Appellant) upon a Mortgage in *Scotland*. And accordingly, 1st *August*, he took an Assignment of an heritable Bond on the Estate of *Robert Pringle* of *Clifton* for 9,000 *l.* bearing Interest at 4½ *per Centum*; for the Purchase of which he remitted the Money from *England* to *Scotland*, but by no Means intending to affect the Appellant, his chief and residuary Legatee, by investing the 9,000 *l.* in an heritable Security descendible to his Heir; on the contrary, fully determined still to preserve them Part of his personal Estate subject to the Disposition in his Will, whereof there is the clearest Evidence, from his Lordship's Instructions to his Agent, to prepare a Deed for securing this Mortgage to the Appellant, in Part Performance of the Covenant in his Marriage Settlement, as appears from the following Correspondence between them:

8 Aug. 1768. The Day of the Assignment of the Mortgage to the Earl, Mr. *Farquharson*, his Agent at *Edinburgh*, wrote to his Lordship at *London* as follows: "If your Lordship continues your Resolution of conveying this Debt to Mr. *John* (the Ap-"pellant) in Part Payment of the Provision *pro tanto* in your Contract of Marriage, the form of a Deed to that Purpose "shall be sent you."

19th Aug. 1768. The Earl answered in these Words: "I still continue my Resolution of conveying the 9,000 *l.* due upon the Estate "of *Clifton*, to my Son *John*, in Implement *pro tanto* of the Provision made for him in my Contract of Marriage."

25th Aug. 1768. Mr. *Farquharson* wrote to the Earl, "Your Lordship is now infeft in *Clifton*'s Debt, and I shall send you a Form of the "Conveyance to Mr. *John* (the Appellant) in a Post or two."

31st Aug. 1768. The Earl answered, "I find I am now infeft in *Clifton*'s Debt, and shall expect the Form of a Conveyance of it to my "Son *John*."

1st Sept. 1768. Mr. *Farquharson* wrote to the Earl, "I send you the Form of a Conveyance of *Clifton*'s heritable Debt to Mr. *John*, "and his Heirs and Assigns whatever. By that Means, was he to fail without Issue, it would devolve upon any other "Son of your present Marriage; and failing Sons upon Lady *Bridget*, or any other Daughter, they being full Blood, "would exclude Lady *Mary*, &c. and their Issue. If this is not your Lordship's Intention, you can vary the Words in "the third Line of the fourth Page, and make a Substitution, failing him, to any other Person you please."

13th Sept. 1768. The Earl answered Mr. *Farquharson*, "If my Son *John* should die without Issue before he is Twenty-one, my Intention "is that the Debt shall go in equal Portions to Lord *Aberdour*, Lady *Mary*, and Lady *Bridget*; and have therefore written the "Clause in the following Words: *To and in Favour of the said Mr.* John Douglas, *and the Heirs of his Body; whom failing,* "*to and in Favour of* Sholto Charles *Lord* Aberdour, *the Lady* Mary, *and the Lady* Bridget Douglas, *in equal Portions.* "Query, Whether will this Substitution put it out of my Son *John*'s Power to make any different Disposition of that Debt "after he shall attain Twenty-one Years of Age, and supposing him to have no Heirs of his own; because, if it should "have such an Effect as to bar him, I would rather let the Disposition run in the Form you have sent it."

Oct. 1768. Mr. *Farquharson* being gone into the Country before this Letter reached *Edinburgh*, it remained unanswered till the Beginning of *October*, when he wrote the Earl a Letter (now in the Respondent's Possession) containing a Clause of Limitation agreeable to the Earl's Intention; and, as soon as it came to hand, the Deed was re-ingrossed, and prepared for the Earl's Execution. It recites the original heritable Bond or Mortgage, the Assignment to the Earl, and proceeds; "Whereas, by Contract of Marriage, dated 30th *July*, 1755, entered into between me on the one Part, and *Bridget* "*Heathcote* on the other Part, I bound and obliged me and my Heirs to make Payment to *Gilbert* and *John Heathcote*, as "Trustees for the Use and Behoof of the Child or Children of the said Marriage, of the Sums therein mentioned, in the "Events and at the Terms therein expressed; declaring always, that whatever Payment should happen to be made by me "to the Child or Children of the said Marriage of their respective Portions before the several Terms of Payment thereof, "should be imputed *pro tanto* in Satisfaction of the same; as the said Contract, to which Reference is had, more fully "imports.—And seeing I am now resolved, in Implement *pro tanto* of the Obligation prestable on me by the said Con-"tract of Marriage, to make over and convey the said heritable Bond of 9,000 *l.* to and in Favour of the Honourable Mr. "*John Douglas*, only Son procreate between me and the said *Bridget Heathcote* my Spouse; therefore know ye me to have "assigned and disponed, *&c.* to and in Favour of the said Mr. *John Douglas*, and the Heirs to be lawfully procreate of

"his

" his Body, and to his Heirs or their Aſſigns, after he or they ſhall attain the Age of Majority, or Twenty-one Years " complete; which failing, to and in Favour of Lords Charles, Lord Aberdour, my eldeſt Son, and Lady Mary and Lady " Bridget Douglas, my Daughters, equally among them, and to their Heirs and Aſſigns whatſoever."

On the Morning of the 11th *October*, the Earl came to *London* from his Houſe at *Chiſwick*, and, in returning the ſame Day, was ſeized on the Road with a Diſorder which increaſed all the Evening; and on the Morning of the 12th, being in his perfect ſenſes, though unable to write, and extremely anxious to have the Deed executed, he ſent his Secretary, Mr. *Forſyth*, to *London* for Mr. *Davidſon* of *Poland ſtreet*, whom he imagined to be a Notary, on Purpoſe to get the Deed executed agreeable to the Forms of the Law of *Scotland*. Mr. *Forſyth* went accordingly in Search of Mr. *Davidſon*, but Mr. *Davidſon* was not a Notary; and beſides, it was underſtood to be neceſſary to have two Notaries to a Deed of that Sort.—They went therefore to *Gray's Inn* for Mr. *Urquhart*, and to *Cavendiſh Square* for Mr. *Mackenzie*, the only Notaries admitted by the Court of Seſſion then in *London*, ſo far as they could learn. Mr. *Urquhart* was not to be found, and they were at laſt obliged to return to *Chiſwick* with only one Notary, *viz.* Mr. *Mackenzie*, and about 12 o'Clock that Day the above recited Deed, conveying 9,000 *l.* heritable Bond, (after being read by his Lordſhip's Directions at his Bedſide) was executed by the Notary for Lord *Morton*, in Preſence of Mr. *Davidſon* and other three Witneſſes. The atteſting Clauſe is in the following Words: " In Witneſs whereof theſe Preſents, written upon this and the thirteen preceding Pages of " ſtamped Paper, by *Thomas Forſyth* my Clerk, are ſubſcribed by me, at *Chiſwick*, in the County of *Middleſex*, the Twelfth " Day of *October*, One thouſand Seven hundred and Sixty-eight, before theſe Witneſſes, *Henry Davidſon*, Solicitor in " *London*, *Richard Leveday*, Apothecary at *Hammerſmith*, *John Stuart*, my Butler, and the ſaid *Thomas Forſyth*; Witneſſes " alſo to the two marginal Notes, one on the ſecond Page, the other on the fourth Page: By Command of the Right " Honourable *James* Earl of *Morton*, who declared he could not write, by Reaſon of Infirmity, and touching the Pen, " I *Kenneth Mackenzie*, Notary Publick, do ſubſcribe theſe Preſents for him, as no other Notary, admitted by the Court " of Seſſion, could be found.—In Preſence of the ſubſcribing Witneſſes (Signed) *Kenneth Mackenzie*, N. P.—*Henry David-* " *ſon* Witneſs, *Richard Leveday* Witneſs, *John Stuart* Witneſs, *Thomas Forſyth* Witneſs."

The Earl died next Morning, and the Appellant, as his Deviſee, was infeoffed in the Mortgage under the above Conveyance.

The Reſpondent, immediately after his Father's Death, took Poſſeſſion of all his Books, Notes, Letters, and Memorandums; and he, together with the two Truſtees appointed for laying out the 30,000 *l.* in Land in *Scotland*, inſiſted upon and procured Payment thereof from the Executors.

The Reſpondent ſucceeded to Eſtates, yielding upwards of 4000 *l. per Annum*, charged only with the Counteſs Dowager's Jointure of 1000 *l. per Annum*; the late Earl having, by his Will, diſcharged theſe Eſtates from the 26,000 *l.* expreſsly charged thereon by his Marriage Settlement for the Children's Fortunes of that Marriage, whereby the Reſpondent was immediately benefited to the Extent of 56,000 *l.* beſides the Library, *&c.* valued at 3500 *l.* and, at the Dowager Counteſs's Death, he takes all the Family Plate, valued at 2000 *l.* and in caſe of the Appellant's Death before Twenty-one without Iſſue, he will be farther intitled to one-third Part of his Fortune, in common with his Siſters Lady *Mary* and Lady *Bridget Douglas*. But not content with all theſe Advantages, he has thought fit to attempt wreſting this 9,000 *l.* Mortgage from the Appellant, (for whom, and for whom alone, it is plain the late Earl intended it) on certain ſuppoſed Informalities in the Deed of Conveyance to him; and with this View, having procured a Precept of *Clare Conſtat*, he got himſelf infeoffed in the Mortgage, and received one Year's Intereſt thereof; whereby the Appellant was forced to bring his Action in the Court of Seſſion, for eſtabliſhing his Right to this 9000 *l.* Mortgage and Intereſt.

Act 80th Parl. 1579. The Reſpondent in Anſwer alledged, 1*mo*, That the Deed 12th *October* 1768, whereon the Action was founded, being of an heretable (*i. e.* real) Eſtate in *Scotland*, not ſigned by the Grantor himſelf, but by one Notary only for him, is abſolutely void and null by the Statute 1579, which enacts, " That Deeds of great Importance be ſubſcribed by the Parties, if " they can ſubſcribe, otherways by two famous Notarys, before four famous Witneſſes." And the Validity of this Deed muſt be determined by the Law of *Scotland*.—2*do*, That it is alſo null and void, at leaſt voidable at the Reſpondent's Suit, having been executed on Death-bed, in Prejudice of him the Heir at Law; on which Ground he had brought an Action for ſetting it aſide.—This Action was afterwards conſolidated with that brought by the Appellant.

The Parties were heard before the Lord Ordinary, when the Reſpondent alledging, that the late Earl of *Morton* had been in a bad State of Health for a conſiderable Time before his Death, thereby inſinuating his Inability to judge of the Fitneſs of any Settlement of his Affairs:—The Appellant, in Anſwer thereto, offered to prove the following Facts:—That the Earl enjoyed better Health during the Summer 1768 than for ſome Years before:—That on the 11th of *October*, the Day on which he was ſeized with the Illneſs whereof he died, he had been at St. *James*'s to take Leave of Count *Bernſtorff*, the King of *Denmark*'s Secretary of State:—That he returned from St. *James*'s to his Houſe in *Brookſtreet*, where he gave Orders to ſome Workmen he was then employing:—That he was that Day taken ill on the Road, returning to *Chiſwick* from Town:—That Mr. *Hunter*, the Surgeon who opened his Body, declared he could not long have ſurvived the Burſting of the Stomach, and that he might have been in his ordinary State of Health a few Hours before ſuch Accident:—That as ſoon as he was taken ill, he mentioned to Mr. *Forſyth*, his Secretary, his Deſire to execute the Conveyance to the Appellant as ſoon as the Violence of the Pain would permit him:—That finding himſelf grow worſe, he did, of his own mere Motion, deſire Mr. *Forſyth* to ſet out for *London* to bring Notaries to execute the Conveyance; and that from the Time his Lordſhip got home, five or ſix Perſons were always preſent with him.

29th Nov. 1770. The Lord Ordinary made the following Order: " Orders the Earl of *Morton*, between and this Day ſe'nnight, to pro- " duce the Letters mentioned in the Purſuer's (*i. e.* Appellant's) Memorial, or to admit that they are of the Tenor therein " mentioned."

6th Dec. 1770. The Reſpondent admitted, that Mr. *Farquharſon*'s three Letters to the Earl relating to the Debt on the *Clifton* Eſtate, and the Earl's three Letters to Mr. *Farquharſon* reſpecting that Debt, and the Conveyance thereof, were all of the Tenor ſet forth in the Appellant's Memorial; and that there was no Occaſion of any Proof of the State and Condition the Earl was in at the Time of executing the Conveyance, there being ſufficient Evidence thereof in the Appellant's Particular of Facts.

29th Dec. 1770. The Lord Ordinary thereupon made *Aviſandum* to the Lords, with the whole Cauſe, and ordered the Parties to lodge their Informations in the Lords Boxes againſt the firſt Sederunt Day in *January* next.

29th June 1771. In Obedience to this Order, Informations were given in for both Parties, and Council heard at the Bar.

On the Part of the Reſpondent it was inſiſted, That the Deed of the 12th *October* 1768, whereby the Earl conveyed to the Appellant the heretable Bond of 9000 *l.* was null and void; 1*ſt*, Becauſe executed only by one Notary, 2*dly*. As having been executed on Death-bed.

With reſpect to the firſt of theſe, the Statute 1579, *cap.* 80. was cited, by which all Writs (Deeds) importing heretable Title or other " Obligations of great Importance are to be ſubſcribed and ſealed by the Parties if they can ſubſcribe, " otherways by two famous Notarys before four famous Witneſſes, *otherways the ſaid Writs to make no Faith*." By this Statute the Reſpondent inſiſted, that the Deed in Queſtion reſpecting an heretable Title, having been ſubſcribed for the Party only by one Notary, is clearly void and null, *and can make no Faith*.

To this it was anſwered for the Appellant, That this Statute, made merely as a Protection againſt Fraud, ought not to be applied to a Caſe in which, by the tacit Admiſſion of the Reſpondent (there not being an Inſinuation to the contrary) there is not the leaſt Pretence of Fraud or Impoſition; it being, on the contrary, evident, that the Deed in queſtion was in purſuance of the Earl's uniform Intention with reſpect to the Diſpoſition of his Affairs:—That it could not be the Intention of the Statute to require the Obſervation of this Form, where, by the Circumſtances of Situation in another Country,

Country, it is impossible to be complied with. In the present Case, the Earl endeavoured to pursue exactly the Form prescribed by the Statute; but that being impossible, he complied with it as far as it was in his Power.—Under such Circumstances, it would be indeed the *summum jus* to allow this Objection to prevail against a Deed in itself clear of every Exception.

Dict. Decisions, 181. Sinclair v. Merry 1636. Erskine v. Ramsay, 1664.

That the Court of Session, in various Instances, in consideration of Necessity, had sustained Deeds, though not executed strictly according to the Forms required by Law: That in Transactions *inter rusticos*, Deeds informal by the Statute Law have been sustained, and Clergymen have been allowed to act as Notaries in the Execution of Last Wills:—That this Indulgence has been particularly applied where the Defect in Form of the Deed has proceeded from its Execution in a foreign Country, of which the Cases in the Margin are direct Authorities.

Jack v. Jack. Dict. vol. 2. p. 536. Sutter v. Cramond, ibid.

That also in Deeds founded upon prior Obligation, the Rigour of this Rule is dispensed with, as there can be no Reason to suspect Fraud in the Execution of a Deed which the Party was under a legal Obligation to make. The Cases in the Margin were cited by the Appellants, in Proof of this Proposition.—That the Deed in Question being, as appeared from the Circumstances of the Case, and as expresly declared in the Deed itself, in Implement *pro tanto* of the Marriage Contract, ought therefore to be sustained, notwithstanding the Informality of the Execution of one Notary.

It was objected, That the Marriage-Contract Obligation for providing the Appellant was much more than satisfied by the Bequests in his Favour in his Father's Will; and therefore the Conveyance of this heretable Bond was not to be considered as made in pursuance of that Contract.

But this Objection is of no Weight; for at the Time of executing this Deed, the Will remained revokable at Pleasure of the Testator, and cannot therefore be regarded, as having then executed the Marriage-Contract Obligation.

Upon the other Ground, the Respondent insisted, That this Conveyance was absolutely null, as having been made upon Deathbed; in which Situation the Law does not permit any Disposition of a real Right to be made.

The Appellant admitted the general Rule of Law with respect to Deathbed Dispositions; but submitted, that this Deed ought not to be considered in the Light of a Deathbed Disposition; for though the Execution of it was under the Earl's last Sickness, and recently before his Death, it is manifest, that the Resolution of conveying the heretable Bond to the Appellant took Place when the Earl was in perfect Health: That he gave Directions for carrying that Intention into Execution: That the Deed was accordingly prepared, and would certainly have been executed before he was taken ill, if it had not been unfortunately prevented by the accidental Delay occasioned by the Absence of his Agent from *Edinburgh*: That this Case ought not therefore to be considered within the Deathbed Law, the Object of which is, to protect the Inheritance of Heirs from being disappointed or injured by Deeds of their Ancestors, made in a Situation of natural Imbecility, and necessarily exposed to the Influence and Imposition of the Persons immediately about them.

Lib. 1. Dieg. 12. § 36. Edmonston v. Edmonston, 1706. Forbes v. Forbes, 1756. Pringle v. Pringle, 1767.

That precedent Obligation forms likewise in this Respect a Ground of Exception out of the general Rule of Deathbed. Sir *Thomas Craig*, who adopted the Law of Deathbed in its utmost Rigour, lays it down as positive Law, That Lands may be alienated upon Deathbed *si alienatio inita est ex contractu precedente ægritudinem*. The Cases in the Margin (the two last of which were adjudged by your Lordships upon Appeal) are direct Authorities to this Point.

That the Deed in Question was in Performance of the Marriage Contract, so intended by the Earl, and so expresly declared by the Deed itself; and upon the Ground of that Obligation, might be well executed, even upon Deathbed.

With Respect to the general Nature of the Respondent's Claim, the Appellants submitted, that it ought to be concluded, by the Circumstances under which it is made; that although the Settlement made by the late Earl of his real and personal Property consisted of various Instruments, yet they ought all to be considered as making one Settlement, and in pursuance of one uniform Intention; and that therefore the present Earl taking a very considerable Succession under that Settlement, should be concluded from impeaching it in any other Respect.

In the Months of *July* and *August* 1766, the late Earl made the final Settlement of his Affairs. The Sale of the *Orkney* Estate being then just concluded, 30,000 *l.* Part of the Purchase-Money of that Estate, together with the whole of his real, and the Residue of his personal Property in *Scotland*, besides various other valuable Bequests, he allotted for the Inheritance of his eldest Son; the Residue of his personal Property in *England* and *France*, over and above 12,000 *l.* settled for the Portion of his Daughter Lady *Bridget*, and various Bequests in favour of his Countess, his Daughter Lady *Mary*, and the Respondent, together with his Capital in the Royal Bank of *Scotland*, his House and Estate at *Chiswick*, and Nine-tenths of his House in *Brook-street*, was to be the Provision of the Appellant, the only Son of his second Marriage.

The Earl's Intention with respect to this Distribution of his Property was so precise, that he added express Clauses in the different Instruments of the Settlement, to prevent either of his Sons from having any Claim against the Succession of the other, beyond the Line of that Distribution. The Trust Deed for settling the 30,000 *l.* Part of the *Orkney* Price, upon the Respondent (first executed 19th and 23d *July* 1766, and renewed 16th *October* 1767) contained an express Proviso, *That if he should thereafter purchase any Lands in* Scotland, *and take the Rights in favour of the Respondent, the Sums laid out in such Purchase should be held in Payment* pro tanto *of the* 30,000 l. *and deducted from it accordingly.*—On the other hand, he directs by his Will, 2d *August* 1766, that the 12,000 *l.* charged by his Marriage Contract upon his real Estate in *Scotland*, for the Portion of Lady *Bridget*, should be paid out of his personal Funds in *England*; and that the Bequest to the Appellant, of the Residue of his personal Estate in *England* and *France*, should, if amounting to the Sum of 14,000 *l.* be in full Satisfaction of that Sum settled upon him by the Marriage Contract, and charged upon the real Estate in *Scotland*, which hereby became exonerated of the Charge of 26,000 *l.* which had been laid upon it in favour of the Issue of the second Marriage.

It is impossible for Intention to appear more evident than it does from these Instruments. There is not a single Circumstance, or even Allegation, in the Cause, that the Earl ever changed that Intention in any Degree.—It is, on the contrary, established by Evidence, beyond the Possibility of Doubt, that he continued to the Hour of his Death in the same uniform Intention with respect to the Distribution of his Property, by which the Settlement of it in *July* and *August* 1766 had been dictated.

The Purpose of the Transaction, with respect to the 9000 *l.* now in Question, is proved with Certainty by the Earl's own Letters, written at the very Time of the Transaction. These directly prove, that in laying out Part of his *English* Personalty upon real Security in *Scotland*, he had not the most distant Idea of altering the Distribution he had made of his Property, or lessening the Share of it which he had allotted to the Appellant.—On the contrary it is manifest, that it was with immediate View to the Advantage and Interest of the Appellant that he resolved to invest that Part of the Property settled upon him in a Fund of a permanent Nature, and yielding a larger Produce than it bore in the Stocks.

The Purchase of the heretable Bond, now in Question, took place upon the 1st *August*, 1768. The various Letters of Correspondence, above stated, between the Earl and his Agent, afford indisputable Evidence that the Earl had no Intention of changing thereby the Disposition which he had made of his Property.—That the only Purpose of the Transaction was to invest Part of the Personalty bequeathed to the Appellant in a Fund of more Permanency and larger Produce; and that though the Conveyance of the Bond was taken by his Agent to the Earl himself, and his Heirs and Assigns, the Purchase was in Truth made for the Behoof of the Appellant.—This the Agent appears manifestly to have understood from the Earl himself; for, on the very Day of the Purchase, he desires his Directions with respect to the Conveyance of it to the Appellant.

Under such Circumstances of the Earl's manifest Intention in the general Settlement of his Property, and in this particular Transaction, the Appellants submitted, upon the strongest Grounds of Equity, that the Respondent, taking a very beneficial

beneficial Succession under that general Settlement, ought to be concluded from challenging the Earl's Intention respecting this Bond; which, having been purchased for the Behoof of the Appellant, and with the Money settled upon him, the Right thereto ought to be adjudged to him pursuant to his Father's Intention, notwithstanding the Form of the Conveyance.

[...]ough v. Jo[...]
[...]fl. vol. 1. 571.
[...]de's Decisions,
[...] Dec. 1668.

In Support of this Argument the Appellant cited the Cases in the Margin, in which the Court had gone so far to answer the Purpose of manifest Intention, that personal Property had been considered as real, and real as Personalty.

The Appellant moreover relied on a late Case of *Aberdeen* against *Aberdeen*; in which the eldest Son of Provost *Aberdeen* claimed an Estate under an Agreement of Sale, taken in the same Way as the present, to the Father, and his Heirs and Assigns: But it appearing, from the Circumstances of the Case, that the Purchase was made for Behoof of the second Son, in whose Favour a Disposition had been made out, and sent to the Vendor to be executed, the Right of the Estate was adjudged to him in Preference of the Claim of the elder Brother, although Provost *Aberdeen*, having been suddenly taken ill, was dead before the Completion of the Conveyance. The Objection of Deathbed was also made in that Case; but it appearing, that though the Provost had contracted the Sickness of which he died when the Conveyance was signed, he was in good Health when he gave the Instructions for it, no Regard was had to the Objection.

Another Ground of Argument urged for the Appellant was founded on the Clause in the Trust Deed settling the 30,000 *l.* of the *Orkney* Price upon the Respondent, which expresly provides, That in case at any Time thereafter the Earl should purchase Lands in *Scotland*, and take the Rights in Favour of his eldest Son, Lord *Aberdour*, the Respondent, and the Heirs Male of his Body in Fee; that, in such Case, the Sums paid for the Lands should be in Implement *pro tanto* of the 30,000 *l.* and deducted from it accordingly.

Upon this Clause the Appellant insisted, that if the Respondent was entitled to the heretable Bond, purchased by the late Earl, it must be taken *pro tanto* in Payment of the 30,000 *l.*

To this it was objected, 1st, That the Clause applies only to Purchases of *Lands*, and that an heretable Bond is not *Land*. 2dly, That it applies only to Purchases of which the Right should be taken in Favour of *Lord Aberdour, and the Heirs Male of his Body in Fee*; whereas the Right to this heretable Bond was taken to the Earl himself, his Heirs and Assigns.

To these Objections it was answered, That *Land* is often used as a general Term for real Rights; and in this Case it manifestly appears to have been the Earl's Intention, that whatever Sum should be laid out by him in real Purchases in *Scotland*, to go to his eldest Son, should be taken *pro tanto* in Satisfaction of the Trust Deed for 30,000 *l.*—That the Will expresly proves, that the Term *Lands* was here used for all *Hereditaments*, as it excepts out of the Disposition of his personal Estate in *England* such Sums as he should lay out in the Purchase of *Lands and Hereditaments* in *Scotland* for the Benefit of Lord *Aberdour*, &c. That though the Right to this heretable Bond had not been taken in the express Form of Limitation mentioned in the Trust Deed, yet as the manifest Intention was, that whatever Rights of Lands should come to the Respondent by his Father's Purchase, the Price thereof should go in Satisfaction *pro tanto* of the 30,000 *l.* the Respondent taking so beneficial an Interest under that Deed, was necessarily concluded from contradicting, by the Rigour of Words, its manifest Intention in this Respect.

Upon the whole, that either the 9000 *l.* in Question must be considered, according to the clear Intention of the Party with respect to its Transmissibility to Representatives, of a personal Nature, notwithstanding its being placed out on a real Security; or that, considering it as a real Right, the Purchase Money must be deemed to go in Part Satisfaction of the 30,000 *l.*

[.]9 June, 1771. The Court pronounced the following Interlocutor: "On Report of the Lord *Stonfield*, and having advised the Informations *hinc inde*, the Lords conjoin the Process of Reduction, at the Instance of the Earl of *Morton* against Mr. *John* "*Douglas* and his Guardians, with the Process of Declarator at their Instance against the Earl; and as to the Declarator, "they sustain the Defences, assoilzie (*i. e.* absolve) the Earl, and decern; and as to the Reduction, they sustain the "Reasons of Reduction, reduce, decern, and declare accordingly."

The Appellant, conceiving himself aggrieved by this Interlocutor, has appealed from the same to your Lordships; and most humbly hopes that the same will be reversed, varied or altered, for the following, among other

REASONS.

I. That the Objection to the Validity of the Conveyance to the Appellant, of 12th *October* 1768, ought not to prevail in this Case; for that the Want of a second Notary was a Matter of Necessity, from the Impossibility of procuring more than one: That the Law makes Allowances for such Circumstances, and in general dispenses with the Omission of Matters merely of Form, rendered impossible by the Situation under which the Deed is executed, and particularly when executed out of *Scotland*.

That the Objection of Deathbed ought not to be allowed to operate against a Deed, which, though finally executed in that Situation, had been determined, directed, and prepared whilst the Party was in perfect Health.

That the Deed in Question was in Performance of the Earl's Obligation by his Marriage Contract; and that such Deeds are always held good, notwithstanding any Imperfections merely of Form.

II. That the various Instruments executed by the Earl to regulate the Succession to his Property, ought to be considered as one general Settlement, so as to conclude the Respondent, taking a very beneficial Succession under that Settlement, from controverting its Intention in any Respect:—That, from all the Circumstances of the Case, and the express Import of the Deeds themselves, it evidently appears to have been the Earl's Intention, that the Appellant should have the Whole of the personal Property (excepting such Things as are otherwise bequeathed by the Will) which was at that Time situated in *England*:—That the Purchase of the Bond in Question was not with any Intention of changing the Disposition of that Sum, or lessening the Appellant's Succession, but was, on the contrary, made solely with a View to the Appellant's Benefit, by investing the Money in a Fund of more Permanency, and better Interest, than that in which it then stood.

III. That if the Respondent is to be held to have a preferable Title to this heretable Bond, the Sum of 9000 *l.* paid for the Purchase of it, must be deducted out of the Sum of 30,000 *l.* settled upon him by the Trust Deed, so as to intitle the Appellant to immediate Repayment of that Sum of 9000 *l.* (the whole Sum of 30,000 *l.* having been paid to the Respondent) or to retain the heretable Bond as Security for it.

E. THURLOW.
AL. FORRESTER.
J. DUNNING.
THO. LOCKHART.

The Honourable John Douglas, } Appellant.
by his Guardians, - - - - }

The Earl of Morton, - - - - Respondent.

The Appellant's CASE.

To be heard at the Bar of the House of Lords, on Wednesday, the 20th Day of January, 1773.